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In the Supreme Court of the United States

OCTOBER TERM, 1988

LO SHIPPERS ACTION COMMITTEE, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Section 11122 of the Interstate Commerce Act, (49 U.S.C.), requires the Interstate Commerce Commission to prescribe nationwide railroad car hire allowances which guarantee that car owners fully recover their costs of ownership.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 857 F.2d 802 (D.C. Cir. 1988). The decision of the Interstate Commerce Commission is reported in *LO Shippers* v. *Aberdeen & Rockfish Ry.*, 4 I.C.C.2d 1 (Pet. App. B1 to B36).

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1988. A timely petition for rehearing was filed on November 4, 1988, and denied on November 18, 1988. The petition for certiorari was filed on February 16, 1989. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Railroads subject to the jurisdiction of the Interstate Commerce Commission (ICC) may provide common carrier service using their own cars, cars belonging to another railroad, or cars owned or leased by a shipper. When a railroad uses cars owned by another railroad for a revenue movement, it pays the owning railroad what is known as a per diem charge. When a railroad uses cars belonging to a shipper or some other non-rail owner, it provides compensation which is known as an allowance.

The Commission originally was given the power to regulate per diem charges and allowances by the Esch Car Service Act of 1917. That authority originally provided (Pet. App. D1 to D2):

> The Commission shall, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service, including the classification of cars, compensation to be paid for the use of any car not owned by any such common carrier and the penalties or other sanctions for nonobservance of such rules.

Three years later, in the Transportation Act of 1920, the statute was amended in several respects. See Pet. App. D2. Most critical for present purposes was the substitution of the word "may" for the word "shall" in the opening clause of the statute. In succeeding years other amendments were adopted. For example, amendments adopted in 1966, during a time of serious car shortages, authorized the Commission to provide for "incentive" per diem charges in order to encourage car ownership. Pet. App. D3. Later in the Staggers Rail Act of 1980, enacted during a time of increasing car surplus, Congress eliminated the provision for incentive charges. Throughout the period after 1920,

however, the statute has continually provided that the Commission "may" establish regulations concerning car service.

As currently codified at 49 U.S.C. 11122, the statute provides:

> Compensation and practice
>
> (a) The regulations of the Interstate Commerce Commission on car service shall encourage the purchase, acquisition, and efficient use of freight cars. The regulations may include—
>
> (1) the compensation to be paid for the use of a locomotive, freight car, or other vehicle;
>
> (2) the other terms of any arrangement for the use by a rail carrier of a locomotive, freight car, or other vehicle not owned by the rail carrier using the locomotive, freight car, or other vehicle, whether or not owned by another carrier, shipper, or third person; and
>
> (3) sanctions for nonobservance.
>
> (b) The rate of compensation to be paid for each type of freight car shall be determined by the expense of owning and maintaining that type of freight car, including a fair return on its cost giving consideration to current costs of capital, repairs, materials, parts, and labor. In determining the rate of compensation, the Commission shall consider the transportation use of each type of freight car, the national level of ownership of each type of freight car, and other factors that affect the adequacy of the national freight car supply.

2. This case concerns a complaint filed by Lo Shippers Action Committee (LOSAC) claiming that allowances paid by railroads for the use of privately owned covered hopper cars are unlawful because they do not allow

owners to recover the "full cost of ownership," including a reasonable return on investment.

Beginning in 1980, allowance rates were set according to a formula contained in an agreement between the railroads and LOSAC. This agreement was not prescribed by the Commission, but was filed as a general allowance tariff. In 1982, the railroads informed LOSAC that, given the growing surplus of covered hopper cars, they would no longer adhere to the compensation formula set forth in the agreement. The railroads accordingly began to set allowance rates individually.

LOSAC filed a complaint with the Commission, claiming that the refusal of the railroads to adhere to the formula set forth in the 1980 agreement was unlawful. LOSAC argued that the agreement formula accurately reflected the costs of car ownership, and that Section 11122 guaranteed owners the full recovery of their costs, regardless of the consequences for other goals enumerated in that provision. LOSAC also challenged reduced allowances filed in tariffs by various carriers in conjunction with reduced freight rates, chiefly on grain. LOSAC sought damages for these alleged past violations of the Act and a uniform nationwide prescription requiring the publication of higher allowances for the future.

The Commission rejected the demand for nationwide relief. As an initial matter, the Commission found that the 1980 agreement was not itself an obligation enforceable against the railroads, because it had not been prescribed by the Commission. Indeed, the Commission observed (Pet. App. B15) that it had "never found it necessary to prescribe a uniform system of compensation to be paid for privately owned covered hopper cars, the cars at issue here."

The Commission then turned to LOSAC's primary contention, that the tariff allowances filed by the railroads

after 1982 were unlawful under Section 11122 because they did not ensure the full recovery of the owners' costs. The Commission rejected this contention, finding (Pet. App. B18) both that the prescription of allowance rates is discretionary, and that if the Commission does prescribe such rates, it must consider a variety of factors under the statute, not just costs. The Commission concluded that its authority to set car compensation rates is discretionary because the statute merely states that the ICC's regulations "may include" the compensation to be paid; the agency noted that it is "not required to prescribe compensation for any type of car" (Pet. App. B15). And the Commission noted that it has consistently recognized[1] that if it does prescribe car hire compensation, it "must consider the sometimes conflicting goals of: (1) a 'fair return' on costs; and (2) the national level of car ownership and other non-cost factors that affect the supply and efficient use of cars" (*ibid.*).

Applying these competing statutory goals to LOSAC's complaint, the Commission stressed the practical consequences of awarding the relief requested by LOSAC, particularly during a time of car surplus. Application of the 1980 formula would result in dramatically higher car rates, increasing allowances from 18 to 24 cents per mile to as high as $1.19 a mile (Pet. App. B11, B20). These higher

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[1] The Commission cited *Car Service Compensation—Basic Per Diem Charges*, 1 I.C.C.2d 742, 749 (1985); *Exemption from Regulation Boxcar Traffic*, 367 I.C.C. 747, 760 (1983), rev'd on other grounds in *Brae Corp.* v. *United States*, 740 F.2d 1023 (D.C. Cir. 1984), cert. denied, 471 U.S. 1069 (1985); *Suspension of Car Hire Updates* (not printed) (served January 2, 1986); *Mileage Allowances for Covered Hoppers, Grain and Grain Products, BN* (not printed) (served December 5, 1985); *Order Granting Railroads Flexibility in Setting Per Diem Levels*, 364 I.C.C. 107, 109 (1980); and *Zone of Reasonableness for Car Hire Charges*, 364 I.C.C. 299, 306 (1980).

allowances, the Commission found, would result in higher freight rates, especially with regard to grain, a major commodity moving in these cars (*id.* at B10, B21). The Commission further found that grain traffic is subject to strong competition that has already forced transportation rates to reduced levels, so that the railroads would have to pass along these increased car hire costs in the form of higher freight rates (*id.* at B21). Such rate increases, the Commission concluded, would result in a further loss of traffic to the railroads, a decrease in covered hopper car use, and an even greater car surplus (*id.* at B20-B21).

Based on this analysis, the ICC determined (Pet. App. B21) that LOSAC's proposal would not further the "efficient use of freight cars." 49 U.S.C. 11122(a). It also found that the proposal would disregard the "transportation use" of each type of freight car (Pet. App. B21), and would contravene Section 11122's instruction that the rate should only be high enough to "encourage the purchase, acquisition, and efficient use of freight cars"—not high enough to encourage a continuing expansion of an already surplus fleet (Pet. App. B19). The Commission concluded (*id.* at B21):

> Taking all the factors of §11122 into account, the assailed levels of car compensation on private covered hopper cars have not been shown to be unlawful. Under prevailing market conditions, reductions below full cost-of-ownership allowance levels have been justified by considerations of excessive fleet size and the need to maximize car use. In fact, the record in this case shows that allowing market based car hire returns, instead of prescribing fixed returns, best accommodates the various factors we are required by the statute to consider.

Although it denied LOSAC's request for nationwide relief, the Commission stressed that this did not preclude

car owners from challenging individual allowances set by railroads.

3. The court of appeals affirmed. The court agreed with the Commission that the language of Section 11122 does not require the agency to prescribe nationwide rates for car compensation (Pet. App. A10-A12). The court also rejected LOSAC's argument that market based allowances below cost (as defined by Section 11122(b)) are unlawful (Pet. App. A12). The court noted that the statute does not indicate whether cost factors or market factors are to be given greater weight in any particular case, and thus found that the agency has considerable discretion to determine how to weigh the various factors (*ibid.*). In light of the statutory language, previous Commission action, and legislative history, the court concluded that the Commission's interpretation of the statute was "more than reasonable" (*ibid.*). Finally, the court held that the ICC, having correctly determined that LOSAC's argument was based wholly on the incorrect premise that Section 11122(b) requires full cost recovery, was not required to consider whether to prescribe allowances above existing rates but below the level demanded by LOSAC (Pet. App. A14).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review by this Court is therefore not warranted.

1. Petitioner's principal argument (Pet. 11-12) relates to the legislative history of the 1966 version of the car hire statute. LOSAC contends that in 1966 Congress set a cost recovery floor for car hire compensation that is still controlling. LOSAC further asserts (Pet. 12-13) that the Com-

mission and the court of appeals disregarded the clear import of the 1966 legislation only by focussing on language introduced by the recodification of the Interstate Commerce Act in 1978. Since the 1978 recodification was not intended to make any substantive changes in the Act, LOSAC concludes that the Commission's interpretation of the Act frustrates the purposes that animated Congress in 1966.

The premises of petitioner's statutory construction argument are doubly flawed. First, the discretionary language relied upon by the Commission and the court of appeals—that car service regulations "may include" rate prescriptions—derives from an amendment to the original Esch Car Service Act of 1917 adopted by Congress in the Transportation Act of 1920. The original Act had provided (Pet. App. D1 to D2 (emphasis added)) that "[t]he Commission *shall*, after [a] hearing * * * establish reasonable rules, regulations, and practices with respect to car service, including * * * compensation to be paid for the use of any car not owned by any such common carrier * * *." The 1920 Act amended this to read (Pet. App. D2): "The Commission *may*, after hearing, * * * establish reasonable rules, regulations, and practices with respect to car service by *carriers by railroad subject to this Act*, including the compensation to be paid for the use of any *locomotive*, car, *or other vehicle* not owned by *the carrier using it* * * *." The critical introduction of the discretionary word "may" thus long predates the recodification of 1978.[2]

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[2] It is true that the recodification rendered the discretionary language as "may include" rather than "may * * * establish," but petitioner has not advanced any reason why this stylistic modification was significant, or why it may have influenced impermissibly the Commission's interpretation.

Second, the 1966 amendment did not purport to take away the Commission's discretion in determining whether to establish regulations. The dispositive language, stating that the Commission "may * * * establish reasonable rules, regulations, and practices" was not changed by the 1966 amendments. See Pet. App. D3. Instead, Congress added a provision directing the Commission to take certain factors into account—including the possibility of requiring incentive payments to stimulate the supply of cars—when it determined to exercise its discretion by establishing such regulations. As the court of appeals recognized (Pet. App. A10), the introduction of the use of the mandatory word "shall" related only to "what factors should be, indeed, must be, employed in determining what those rates will be if and when regulated."[3]

In any event, even if petitioner were correct in its characterization of the intention of Congress in 1966, those intentions were largely if not totally negated by important changes made in Section 11122 in 1976[4] and 1980.

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[3] Thus, if the Commission elects to prescribe per diem rates or allowances, subsection (b) of Section 11122 lists a number of factors which the Commission must consider in setting such rates, including (1) "the expense of owning and maintaining that type of freight car;" (2) a "fair return on its cost;" (3) "the transportation use of each type of freight car;" (4) "the national level of ownership of each type of freight car;" and (5) "other factors that affect the adequacy of the national freight car supply." The Commission, however, is not required to issue regulations prescribing rates of compensation for car service when requested to do so; subsection (a) of Section 11122 makes clear that the Commission's regulations "may include" prescribed rates of compensation, but does not say that the regulations must include this element.

[4] In the 1966 amendment, the ICC was instructed to "determine whether compensation should be computed solely on the basis of elements of ownership expense * * * or whether such compensation should be increased by such incentive element * * *." See Pet. App.

Specifically, in the Staggers Rail Act of 1980, Congress eliminated the incentive per diem provision introduced in 1966, and the legislative history accompanying that change unequivocally supports the Commission's interpretation of the statute.

Shortly before the enactment of the Staggers Act, the Commission had announced that flexibility was necessary in setting per diem rates in order to improve car use during what the Commission characterized as a period of rapidly worsening car surplus. *Order Granting Railroads Flexibility in Setting Per Diem Levels,* 364 I.C.C. 107 (1980). The Conference Report on the Staggers Act indicates that Congress was aware of the Commission's position, and approved of it. The Report instructed the agency to "continue to examine means (such as flexible car hire) of making basic car hire more responsive to market forces * * *." (H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 117 (1980)). Congress even used the same term that the ICC had used to describe its program of allowing car hire rates to fall below full cost during times of car surplus: "flexible car hire." In light of this clear ratification of the agency's policy, the court of appeals correctly upheld the Commission's interpretation to allow lower allowances in times of car surplus.[5]

D3. In the Rail Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 212, 90 Stat. 46, Congress deleted the instruction to the ICC to consider setting basic compensation *solely* based on ownership expenses, ~~Congress~~ AND reorganized the statute to require the ICC to consider several noncost factors in the formula, including transportation use, national level of ownership, and adequacy of supply. See Pet. App. D4 to D5.

[5] It follows that higher allowances during periods of car shortage would also be appropriate. As the Commission explained in *Zone of Reasonableness for Car Hire Charges,* 364 I.C.C. 299, 305 (1980), while in the short term compensation rates may fluctuate at times

2. LOSAC contends (Pet. 22-25) that the decision of the court of appeals is in conflict with the Court's decision in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422 (1940), which it believes stands for the proposition that the Commission must prescribe allowances whenever it is requested to do so.[6] However, in *El Dorado Terminal*, the Court was concerned with a different provision of the Act, former Section 15(13) (now 49 U.S.C. 10747) which gives the ICC authority to determine whether allowances to shippers are too high (amounting in effect to a rebate). The Court merely said that allowances must be published openly in a tariff, and that the issue of whether such rates are too high is for the Commission to determine in the first instance. 308 U.S. at 432. *El Dorado Terminal* thus does not require that the Commission prescribe a floor for allowances upon complaint especially when, as here, the party requesting that action has not met its burden of proving that a prescription is necessary under the Act.

3. Finally, LOSAC contends (Pet. 25-26) that the court of appeals erred in permitting the Commission to deregulate allowances without making the required findings under the provision for exempting carriers from provisions of the Act, 49 U.S.C. 10505. The short answer to this contention is that the Commission has not deregulated

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below full cost, in the long run (the life of the car), ownership costs will be returned to encourage purchase of an appropriate car supply.

[6] The court of appeals decision here is in harmony with the only court of appeals decisions dealing with Section 11122. The court's basic conclusion that in regulating car hire, the Commission properly took heed of all of the factors enumerated in that provision, is in accord with the decisions in *Consolidated Rail Corp.* v. *United States*, 619 F.2d 988 (3d Cir. 1980), and *Brae Corp.* v. *United States*, 740 F.2d 1023 (D.C. Cir. 1984), cert. denied, 471 U.S. 1069 (1985).

car hire allowances. The Commission did not refuse to adjudicate LOSAC's complaint. Rather, it simply found that LOSAC had failed to meet its burden of proof. The Commission also determined that it would not further the goals of Section 11122 to promulgate new regulations imposing an unprecedented nationwide prescription of car hire rates for covered hopper cars. That is not deregulation either, because the Commission merely maintained the status quo. Finally, as the Commission explained (Pet. App. B30 (footnote omitted)):

> Although we are declining to prescribe a uniform system of car allowances, shippers and car owners who believe that a carrier or carriers have forced them to supply cars for unreasonably low compensation can seek prescription to remedy a specific problem.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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